

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

NATHAN WITT, a minor child, by and  
through his parents, VALERIE L. WITT, and  
DANIEL A. WITT, husband and wife,  
individually as a marital community, and on  
behalf of their minor child,

Plaintiff,

v.

MARION WARE, *et al.* ,

Defendants.

Case No. C04-5139FDB

ORDER GRANTING IN PART  
MOTION TO DISMISS FOR  
FAILURE TO ATTEND  
DEPOSITION AND FOR COSTS  
AND FEES

Nathan Witt allegedly was abused and medically neglected by his biological parents and was ultimately adopted by the Witts. Plaintiffs bring the previously mentioned claims alleging that the individually named defendant social workers, a mental health counselor, and a foster parent engaged in a conspiracy to deprive Plaintiffs of their civil rights. Plaintiffs claims pursuant to 42 U.S.C. § 1983 have previously been dismissed. [Dkt. # 49] The Parents' claims for loss of the parent/child relationship have been dismissed as well. [Dkt. # 58] Nathan Witt is no longer a minor, but there is a pending motion to substitute Valerie Witt in place of Nathan Witt as his representative.

1 Nathan Witt's deposition was scheduled for July 1, 2005 and notice of this deposition was  
2 prepared and mailed to Plaintiff's counsel on June 17, 2005; additionally, Defendants sent a reminder  
3 of the deposition by facsimile and by U.S. mail on June 29, 2005. Defendant's counsel noted in the  
4 reminder, "I am aware that you indicated some difficulty in locating and making Mr. Witt available  
5 for his deposition. However, the State has the right to depose a party to this lawsuit." (James Decl.  
6 Ex. 4.) Nathan Witt did not appear for his deposition. Valerie Witt, who was at the deposition, was  
7 asked about her efforts to get him to attend, and she explained that Nathan is homeless, but she  
8 knows the places where he "hangs out," that the last time she saw him was the week before June 15,  
9 2005 and that she talked to Nathan on the telephone on June 15, 2005. She reported that Nathan  
10 hung up on her before she could give him the details about the scheduled deposition, that "He didn't  
11 want anything to do with anything," and "His words is he's just sick and tired of talking to people."  
12 (James Decl., Ex. 5, pp. 4-6.) Defendants incurred costs for the deposition and attorney's fees and  
13 for preparing this motion in the amount of \$538.80.

14 Additionally, on May 21, 2004 Defendants mailed their First Interrogatories and Requests for  
15 Production to Nathan, Valerie, and Daniel Witt. Defense counsel extended the time to respond by  
16 two weeks on June 17, 2004. Plaintiff's counsel wrote to Defense counsel on July 1, 2004 as  
17 follows:

18 This is to follow up on my letter regarding interrogatories in the above case. We do  
19 not believe that Nathan Witt is competent, and, therefore, we do not feel confident in  
answering the interrogatories.

20 (James Decl., Ex. 9.) Later, in a statement signed September 2, 2004, Nathan Witt states:

21 I am aware that this lawsuit is going on. I have read the Complaint in this matter. I  
22 want to continue to be a part of this lawsuit. I have met with Gary Preble and want  
him to represent me as my attorney in this matter against the State of Washington and  
23 others.

24 (James Decl. Ex. 10.)  
25  
26

1 Under Fed. R. Civ. P. 37(d), the Court may make such orders that are appropriate when a  
2 party fails to appear for a deposition after being served with proper notice. The Court has discretion  
3 to dismiss the action, among other things. Fed. R. Civ. P. 37(b)(2).

4 Defendants move for dismissal for Nathan Witt's failure to appear for his own deposition and  
5 move for their reasonable expenses including attorneys fees.

6 Plaintiffs respond that dismissal is too harsh a penalty in view of the fact that Nathan has  
7 since been incarcerated and his deposition was set at the Olympia jail on July 20, 2005. As far as the  
8 failure to respond to discovery requests, Plaintiffs suggest that at the deposition, Defendants may ask  
9 Nathan any appropriate questions.


10 Plaintiffs excuses are not convincing in the face of the importance of a defendant being able  
11 to depose a party or to obtain discovery from a party in a lawsuit. In view of the deposition having  
12 been rescheduled, the Court will not order dismissal, but monetary sanctions in the form the costs,  
13 including attorney's fees incurred is appropriate.

14 ACCORDINGLY, IT IS ORDERED:

15 1. Defendants' Motion To Dismiss, Pursuant to FRCP 37(d) for Plaintiff's Failure To  
16 Attend His Own Deposition And For Costs And Fees [Dkt. # 55] is GRANTED in  
17 part and DENIED in part as follows: dismissal is denied, but Plaintiff shall pay to  
18 Defendants their costs and fees in the amount of \$538.80; and

19 2. Payment shall be made within ten days from the entry of this Order.

20 DATED this 3<sup>rd</sup> day of August 2005.

21   
22 FRANKLIN D. BURGESS  
23 UNITED STATES DISTRICT JUDGE  
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